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Mohd Yusof bin Mohd Rakim & Anor v Shanta a/p Periasamy & Anor

B HIGH COURT (IPOH) — CIVIL APPEAL NO 12–109 OF 2002
VT SINGHAM J
4 MAY 2006

C *Evidence — Adverse inference — Failure to call material witness — Plaintiffs chose not to call driver of van to establish negligence against defendant in motor accident claim — Whether driver was inconsequential witness — Whether adverse inference invoked against plaintiffs*

D *Tort — Negligence — Road accident — Failure to call driver to establish negligence against defendant — Whether sufficient evidence to prove negligence of defendant*

E *Tort — Negligence — Road accident — Finding of negligence by court — Whether there must be a finding of negligence on part on defendant before defendant could be held to be 100% liable — Whether defendant had duty to prove he was not negligent*

F The first defendant was the driver of the bus which was involved in a motor accident with the van in which the deceased was travelling as a passenger. It was alleged that the first defendant was negligent thus causing the collision. At the trial, the driver of the van was not called to give evidence. The learned sessions court judge found the first defendant 100% liable for the death of the deceased passenger. The defendants appealed. The main issue in the appeal was whether the learned sessions court judge was correct in holding that the first defendant was 100% liable for the accident.

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Held, allowing the appeal:

(1) The reasoning applied to find the first defendant 100% liable for the accident was a 'faulty judicial reasoning' which would justify this court interfering. The first defendant could not be held liable in a mechanical fashion to the plaintiffs' claim without the trial court having first found whether the first defendant was negligent and make an express finding to the extent of his negligence which the learned sessions court judge had failed to do so (see para 9).

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(2) On the totality of the evidence, both oral and documentary as found in the cold print in the record of appeal, this court found that there was insufficient evidence to attach any negligence against the first defendant as required by law or even to draw any inference against the first defendant. There was no duty on the part of the first defendant to prove that he was not negligent for the

accident until the plaintiffs have established negligence against the first defendant which the plaintiffs had failed (see para 11).

(3) It was incumbent on the part of the plaintiffs to have called the driver of the van as their witness to establish negligence against the first defendant if in fact the first defendant was negligent for the collision (see para 15). As the plaintiffs having chosen and elected not to lead evidence through the driver of the van to establish their case, this court could only hold that there was no evidence or its version on behalf of the plaintiffs as to how the accident had occurred before the trial court to adjudicate upon. Even on the totality of the evidence which included the first defendant's version of how the accident occurred, the plaintiffs had still failed to establish on the balance of probabilities any negligence as pleaded against the first defendant (see para 16).

(4) The non-production of the driver of the van in which the deceased was travelling could not be said as an inconsequential witness. It would appear from the facts that it was a reasonable inference which could be drawn in the absence of any or any reasonable explanation that there was deliberate withholding of a witness and the learned sessions court judge was wrong in not invoking an adverse inference under s 114(g) of the Evidence Act 1950 against the plaintiffs for not calling the driver of the van as a witness to throw light to the court as to how the accident occurred (see para 17).

[Bahasa Malaysia summary

Defendan pertama adalah pemandu bas yang terlibat dalam satu kemalangan motor dengan sebuah van yang mana si mati sedang naiki sebagai penumpang. Ia dikatakan bahawa defendan pertama telah cuai dan menyebabkan perlanggaran itu. Semasa perbicaraan, pemandu van itu tidak dipanggil untuk memberi keterangan. Hakim mahkamah sesyen yang bijaksana mendapati defendan pertama 100% bertanggungjawab kerana kematian si mati penumpang itu. Defendan-defendan telah merayu. Persoalan utama dalam rayuan tersebut adalah sama ada hakim mahkamah sesyen yang bijaksana betul dalam memutuskan bahawa defendan pertama adalah 100% bertanggungjawab kerana kemalangan itu.

Diputuskan, membenarkan rayuan tersebut:

(1) Alasan yang digunakan untuk mendapati defendan pertama 100% bertanggungjawab kerana kemalangan itu adalah satu 'faulty judicial reasoning' yang boleh menjustifikasikan campur tangan mahkamah ini. Defendan pertama tidak boleh dipertanggungjawabkan dalam cara yang mekanikal terhadap tuntutan plaintif-plaintif itu tanpa mahkamah perbicaraan terlebih dahulu mendapati sama ada defendan pertama adalah cuai dan membuat satu penemuan yang nyata setakat kecuaiannya yang mana hakim mahkamah sesyen yang bijaksana gagal berbuat demikian (lihat perenggan 9).

(2) Berdasarkan keseluruhan keterangan, kedua-dua lisan dan dokumentar seperti yang didapati dalam rekod rayuan, mahkamah ini mendapati bahawa keterangan tidak mencukupi untuk mengaitkan apa-apa kecuaian terhadap

defendan pertama sepertimana yang dikehendaki oleh undang-undang maupun dapat menunjukkan apa-apa inferens terhadap defendan pertama. Tiada kewajipan di pihak defendan pertama untuk membuktikan bahawa beliau tidak cuai kerana kemalangan itu sehingga plaintif-plaintif telah membuktikan kecuaian terhadap defendan pertama yang mana plaintif-plaintif telah gagal berbuat demikian (lihat perenggan 11).

(3) Adalah wajib di pihak plaintif-plaintif untuk memanggil pemandu van itu sebagai saksi mereka untuk membuktikan kecuaian terhadap defendan pertama jika sememangnya defendan pertama itu telah cuai menyebabkan kemalangan itu (lihat perenggan 15). Memandangkan plaintif-plaintif telah memilih untuk tidak mengemukakan keterangan melalui pemandu van untuk membuktikan kes mereka, mahkamah ini hanya memutuskan bahawa tiada keterangan atau versinya bagi pihak plaintif-plaintif berhubung bagaimana kemalangan itu berlaku di hadapan mahkamah perbicaraan untuk mengadili. Meskipun berdasarkan keseluruhan keterangan termasuklah versi defendan pertama berhubung bagaimana kemalangan itu berlaku, plaintif-plaintif masih gagal untuk membuktikan atas imbangan kebarangkalian apa-apa kecuaian seperti yang dirayukan terhadap defendan pertama (lihat perenggan 16).

(4) Pemandu kepada van yang tidak dikemukakan yang mana si mati adalah penumpang tidak boleh dikatakan sebagai saksi yang tidak penting. Ia kelihatan berdasarkan fakta-fakta bahawa ia adalah satu inferens yang munasabah yang boleh dibuat dalam ketiadaan apa-apa penjelasan yang munasabah bahawa terdapat keengganan mengemukakan saksi dengan sengaja dan hakim mahkamah sesyen yang bijaksana terkhilaf kerana tidak menggunakan inferens yang memudaratkan di bawah s 114(g) Akta Keterangan 1950 terhadap plaintif-plaintif kerana tidak memanggil pemandu van itu sebagai saksi untuk menunjukkan kepada mahkamah bagaimana kemalangan itu berlaku (lihat perenggan 17).]

Notes

For cases on failure to call material witness, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 150–157.

For cases on road accident negligence, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1056–1288.

Cases referred to

Bigsby v Dickson (1876) 4 ChD 24 (refd)

Chan Yoke Lain (Administrator of the Estate of Chong Yoke Fah, deceased)v Pacific & Oriental Insurance Co Sdn Bhd [1999] 1 MLJ 303 (refd)

Chia Han Kiat v Rex [1937] MLJ 261 (refd)

Choo Kok Beng v Choo Kok Hoe & Ors [1984] 2 MLJ 165 (refd)

Chung Hwa Ying v Phang Mun Mooi & Anor [1987] 2 MLJ 693 (refd)

Coglan v Cumberland (1898) 1 Ch 704 (refd)

Damai Cheras Sdn Bhd & Anor v Poothapillai Krishnamorthy [1998] 1 MLJ 639 (refd)

Development and Commercial Bank v Num Tjuan Sdn Bhd [1989] 1 MLJ 475 (refd)

Eastern Enterprise Ltd v Ong Choo Kim [1969] 1 MLJ 236 (refd)

Fardon v Harcourt-Rivington [1932] All ER 81 (refd)

Glannibanta, The (1876) LR 1 PD 283 at p 287 (refd)

Gopal Krishnajiketkar v Mohamed Haji Latif AIR 1968 SC 1413 (refd)
Hirschhorn v Evans [1938] 3 All ER 491 (refd)
Jaafar bin Shaari & Anor v Tan Lip Eng & Anor [1997] 3 MLJ 693 (refd)
Jafri bin Elias v Khor Tan Seah [1992] 2 CLJ 1016 (refd)
Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627 (refd)
Karumalay a/l Vanniyan & Anor v Ananthan a/l Rethinam [2005] 3 MLJ 600 (refd)
Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors [1998] 3 MLJ 457 (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97 (refd)
Lee Sang Cheah v Rex [1946] MLJ 22 at p 24 (refd)
Len Min Kong v United Malayan Banking Corp Bhd and another appeal [1998] 2 MLJ 478 (refd)
Lim Soh Meng & Anor v Krishnan [1967] 1 MLJ 8 (refd)
Muniandi a/l Periyan & Anor v Eric Chew Wai Keat & Anor [2003] 3 MLJ 527 (refd)
Neo Chan Eng v Koh Yong Hoe [1960] MLJ 291 (refd)
Ng Chui Sia v Maimon bte Ali [1983] 1 MLJ 110 (refd)
Ramoo v Gan Soo Swee & Anor [1971] 1 MLJ 235 (refd)
Reliance Omnibus Co Sdn Bhd & Anor v Ishak bin Mohd Jaafar & Anor [1993] 4 CLJ 291 (refd)
Robins v National Trust Co [1927] AC 515 (refd)
See Keng Wah v Lim Tew Hong [1957] MLJ 137 (refd)
Selvaduray v Chinniah [1939] MLJ 253 (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395 (refd)
Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd [1998] 1 MLJ 697 (refd)
Yew You & Anorv Mah Poay Koh & Anor [1970] 1 MLJ 57 (refd)

Legislation referred to
Evidence Act 1950 ss 103, 114(g)

Leong Sai Hwa (CK Leong & Co) for the appellants/defendants.
T Ellangovan (Kula & Associates) for the respondents/plaintiffs.

VT Singham J:

[1] This is an appeal by the defendants against the decision of the learned Sessions Court Judge Ipoh who had found the driver of motor bus, No ACC 8966, the first defendant 100% liable on 27 September 2002 for the death of the passenger in motor van No ABS 8472 arising out of a motor accident on 11 May 1993 involving the motor bus driven by the first defendant and the motor van in which the deceased was travelling as a passenger.

[2] By the statement of claim and under the particulars of negligence, the plaintiffs have alleged that on 11 May 1993 at or about 6.10pm while the deceased was travelling in motor van No ABS 8472 at/near the 10th kilometre Manong — Kuala Kangsar road (Kg. Lempor) Manong, Perak, the motor bus which was driven by the first defendant negligently overtook and/or attempted to overtake the said motor van

A and suddenly collided into the said motor van. It is also, inter alia, alleged that the first defendant had negligently and suddenly stopped the motor bus and caused an obstruction to the said motor van.

[3] On the other hand, the first defendant who was the driver of the motor bus, B has testified in court that he had stopped at the place of the accident for about two minutes to allow students who were passengers in the motor bus to alight. After he had waited for about two minutes he heard a sound from the rear of the motor bus and when he got down he found the motor van had got stuck to his motor bus. He denied overtaking any vehicle or the motor van or that the accident occurred after C he overtook motor van, or he had entered back into his lane and had stopped as alleged.

[4] The main issue in the instant appeal is, whether the learned sessions court judge was correct in holding that the first defendant was 100% liable for the accident. D In this judgment, the appellants and respondents will be referred to as the defendants and plaintiffs respectively. In other words, have the plaintiffs discharged the onus of establishing negligence against the first defendant on a balance of probabilities even if the first defendant's version of how the accident occurred is disbelieved.

E **[5]** At the outset of this appeal, it is important to state that by consent, the police report No 196/93 (Manong) lodged by the driver of motor van No ABS 8472 on 14 June 1993 is excluded from the record of appeal and disregarded for the purpose of this appeal as being not part of the evidence at the trial in the sessions court (see *Jaafar bin Shaari & Anor v Tan Lip Eng & Anor* [1997] 3 MLJ 693).

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[6] This court has reminded itself that though the principles on which this court in its appellate jurisdiction will be slow to review the findings of fact of a trial court which are well settled, the application or non-application may not be satisfactory in all cases as each appeal is considered on its own set of facts, the reasoning and the G decision of the trial court. However, if the learned sessions court judge is found to be wrong, this court in its appellate jurisdiction and on well-established principles cannot just abrogate its function but has to review and if necessary interfere with the finding where in the instant appeal, the first defendant has been found to be 100% liable for the accident. In *Chia Han Kiat v Rex* [1937] MLJ 261, Terrell Ag CJ said:

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> This is admittedly an appeal against findings of fact, and I fully indorse the principle that an appellate Court should but rarely interfere with conclusion arrived at by the Judge or Magistrate who has had the advantage of hearing the witnesses and obtaining an impression of their veracity from their demeanour. But it is the duty of an Appellate Court to be Judge of fact as well as law, and it would be abrogating its function if it made a hard and fast rule I never to interfere with findings of fact, and felt bound to support a judgment which, on a review of all the evidence, it considered to be clearly wrong..

(See *Development and Commercial Bank v Num Tjuan Sdn Bhd* [1989] 1 MLJ 475 at pp 476–477), *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395, *Coghlan v Cumberland* (1898) 4 Ch D 24 and *Bigsby v Dickson* (1876) 4 ChD 24)

[7] On the other hand, if the learned sessions court judge has misapplied or failed to appreciate the significance of any part of the evidence, it may have an important bearing on the weight which the appellate court attaches to the evidence as a whole (see *Lee Sang Cheah v Rex* [1946] MLJ 22 at p 24). (See also *Chung Hwa Ying v Phang Mun Mooi & Anor* [1989] 2 MLJ 693 at p 694).

[8] This court is of the view that where the court is left in doubt upon reading the evidence produced on behalf of the plaintiffs and the defendants as to whether any negligence has been proved against the first defendant, the result would be the plaintiffs had failed to discharge the burden which lies upon them of establishing negligence against the first defendant (see *Lim Soh Meng & Anor v Krishnan* [1967] 1 MLJ 8). Based on the evidence as contained in the record of appeal, it cannot be disputed that the plaintiffs have in fact failed to establish any negligence or on the particulars of negligence as pleaded and as alleged in paragraph 3 of the statement of claim. In other words, on the totality of the evidence, the plaintiffs have failed to establish any negligence against the first defendant.

[9] This court finds that the decision of the learned sessions court on liability is not a reasoned decision and contains serious error of law and fact, misdirection, and defect in its reasoning. In fact, the reasoning relied on by the learned sessions court in finding the first defendant 100% liable for the accident is a misreading and misapplication of the judgment in *Reliance Omnibus Co Sdn Bhd & Anor v Ishak bin Mohd Jaafar & Anor* [1993] 4 CLJ 291 and *Damai Cheras Sdn Bhd & Anor v Poothapillai Krishnamorthy* [1998] 1 MLJ 639 and also the common law principle on liability where it involves an innocent passenger. The reasoning applied to find the first defendant 100% liable for the accident is a 'faulty judicial reasoning' which would justify this court interfering (see *Len Min Kong v United Malayan Banking Corp Bhd and another appeal* [1998] 2 MLJ 478). The first defendant, in the instant appeal cannot be held liable in a mechanical fashion to the plaintiffs' claim without the trial court having first found whether the first defendant is negligent and make an express finding to the extent of his negligence which the learned sessions court judge had failed to do so (see *Jafri bin Elias v Khor Tan Seah* [1992] 2 CLJ 1016 at p 1019 and *Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165).

[10] This court has considered that it has been denied the advantage which the trial judge had of seeing and hearing the witnesses and observing the manner in which their evidence have been given and that the cold print in the record of appeal cannot give any indication of the deameanour of the witnesses and therefore, its findings of fact should not be disturbed in appeal unless for good and cogent reasons. However, if there are other material factors which have escaped attention or have been disregarded by the learned sessions court judge which would have a bearing to the decision, this court would be justified in setting aside the findings of the trial court and instead arrives at its own conclusion on facts (see (i) *The Glannibanta* (1876) LR 1 PD 283 at p 287, (ii) *Coglan v Cumberland* (1898) 1 Ch 704 at p 705, (iii) *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395) and (iv) *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97).

A **[11]** On the totality of the evidence, both oral and documentary as found in the cold print in the record of appeal, this court finds there was insufficient evidence to attach any negligence against the first defendant as required by law or even to draw any inference against the first defendant. It is important to be reminded that there is no duty on the part of the first defendant in the instant appeal to prove that he is not
B negligent for the accident until the plaintiffs have established negligence against the first defendant which the plaintiffs have failed (see (i) *Chung Hwa Ying v Phang Mun Mooi & Anor* [1987] 2 MLJ 693 at p 694, (ii) *Jafri bin Elias v Khor Tan Seah* [1992] 2 CLJ 1016 at p 1019 and (iii) *Eastern Enterprise Ltd v Ong Choo Kim* [1969] 1 MLJ 236 at p 244).

C **[12]** Nevertheless, on the set of facts in the instant appeal, it does appear to this court that the learned sessions court judge had missed or disregarded material facts which were brought to his attention. In other words, there are glaringly misdirection and misapplication of the law to the facts. Moral philosophy or consideration has no relevance to liability at law and it runs counter to well established and wholly
D acceptable law to claim in negligence. The trial court cannot stretch its powers or discretion to find the first defendant liable just for the sake of ensuring compensation to the deceased's family without first making a finding whether the plaintiffs have established negligence against the first defendant on the balance of probabilities which the learned sessions court judge had failed to do in the instant appeal. It is
E desirable in cases of negligence, as in any other field that the law should be maintained such a measure of certainty as is consistent with the demands of justice.

[13] It is also not open to this court to try and make out a case for the plaintiffs or to attach liability even to the extend of finding 1% negligence against the first
F defendant as submitted by learned counsel for the respondent as a desperate attempt so that the deceased's family, the plaintiffs will be able to obtain compensation on 100% as the deceased was a passenger in motor van No ABS 8472 unless the plaintiffs have in fact established negligence against the first defendant on the balance of probabilities.

G **[14]** In the instant appeal, since the plaintiffs had decided to proceed with their claim for alleged negligence against the first defendant and close its case without producing any evidence to establish negligence and without producing the most essential and material witness, being the driver of the said motor van where there is no evidence before the court that he was not available or cannot be traced nor a
H subpoena was applied and it could not be served, it is the risk which the plaintiffs have taken and it is not the defendants' fault. The fact that the first defendant has applied to issue third party proceedings against the driver of the motor van No ABS 8472 and that was the reason why the driver of the said motor van was not called as a witness for the plaintiffs as submitted by learned counsel for the plaintiffs from the Bar is misplaced in law and does not relieve the plaintiffs of their duty to produce
I evidence which was available to establish negligence against that first defendant which is lacking in the instant appeal.

[15] Where a party, in the instant case, the plaintiffs have the means of proving the claim against the first defendant, if a true one, the proper course was to produce the

driver of the motor van to court and establish their case and not shrink from taking such steps. In the instant appeal, how the accident occurred is within the knowledge of the driver of the motor van and therefore it was incumbent on the part of the plaintiffs to have called the driver of the motor van as their witness to establish negligence against the first defendant if in fact the first defendant was negligent for the collision.

[16] As the plaintiffs having chosen and elected not to lead evidence through the driver of the said motor van to establish their case, this court could only hold that there was no evidence or its version on behalf of the plaintiffs as to how the accident had occurred before the trial court to adjudicate upon. On the other hand, even without the evidence or version of the driver of the motor van as to how the accident occurred, this court has also considered the admissible documentary evidence in law produced on behalf of the plaintiffs and still found that the plaintiffs had not established any negligence against the first defendant in order for the first defendant to answer the plaintiffs' claim. However, since the first defendant chose to testify and placed his version of how the accident occurred before the court, it is the duty of the trial court at that stage and at the conclusion of the defence case to consider and evaluate whether on the totality of the evidence, the plaintiffs had established any negligence against the first defendant. This court is of the view that even on the totality of the evidence which included the first defendant's version of how the accident occurred, the plaintiffs have still failed to establish on the balance of probabilities any negligence as pleaded against the first defendant (see (i) *Neo Chan Eng v Koh Yong Hoe* [1960] MLJ 291, (ii) *Yew You & Anorv Mah Poay Koh & Anor* [1970] 1 MLJ 57 at p 59, (iii) *Ng Chui Sia v Maimon bte Ali* [1983] 1 MLJ 110 dan (iv) *Muniandi a/l Periyan & Anor v Eric Chew Wai Keat & Anor* [2003] 3 MLJ 527). Accordingly, the learned sessions court judge ought to have made such a finding and dismissed the plaintiffs' claim which he had failed to do.

[17] In the instant appeal, the maxim that the court may presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it or without advancing any reason or explanation fails to produce it is applicable. The non-production of the driver of the motor van in which the deceased was travelling cannot be said as an inconsequential witness. It would appear from the facts that it is a reasonable inference which can be drawn in the absence of any or any reasonable explanation that there is deliberate withholding of a witness and the learned sessions court judge was wrong in not invoking an adverse inference under s 114(g) of the Evidence Act 1950 against the plaintiffs for not calling the driver of the said motor van as a witness to throw light to the court as to how the accident occurred.

[18] In the instant appeal, the first defendant has denied he was negligent for the accident and has put the plaintiffs on notice by the statement of defence and his police report as to how the accident occurred. Therefore, there was an obligation on the part of the plaintiffs to have produced the driver of the motor van to establish the plaintiffs' allegation of negligence as pleaded against the first defendant which rest with the plaintiffs (see s 103 of the Evidence Act 1950, *Eastern Enterprise Ltd v Ong Choo Kim* [1969] 1 MLJ 236 at p 244 and *Tan Kim Khuan v Tan Kee Kiat (M) Sdn*

A *Bhd* [1998] 1 MLJ 697). There was no reason or evidence adduced on behalf of the plaintiffs for not producing the said driver of the motor van as their witness and to make him available for cross-examination as the party who alleged must be able to establish its case. Therefore, an adverse inference as provided under s 114(g) of the Evidence Act 1950 ought to be invoked against the plaintiffs (see *Juahir bin Sadikon* B *v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627 at p 635).

[19] On the facts in the instant case and bearing in mind that there is a police report lodged by the driver of the motor van in which the deceased was travelling at the time of the collision, it is not only proper but appropriate for the learned sessions C court to have drawn an adverse inference under s 114(g) of the Evidence Act 1950 against the plaintiffs as there is no evidence that the witness could not be produced or traced or the plaintiffs were not in a position to produce better evidence but in fact abstained from doing so (see *Gopal Krishnajiketkar v Mohamed Haji Latif* AIR 1968 SC 1413). There is no evidence whether any subpoena was applied or issued to the D driver of the motor van to make him attend court. Under the circumstances and on the facts in the instant appeal, there was a strong and compelling reason for the exercise of powers of the learned sessions court judge to draw an adverse inference against the plaintiffs as correctly submitted by learned counsel for the defendants in the court below and at this appeal.

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[20] The court is entitled to the best evidence available before it can be called upon for a decision and if the plaintiffs have failed to call a material or essential witness, in the instant case, the driver of the motor van as conceded by learned counsel for the plaintiffs and there is no satisfactory explanation why the said driver of the motor F van was not called as witness for the plaintiffs, the court is entitled to presume, in his absence, that his evidence would not be in favour of the plaintiffs' case (see *See Keng Wah v Lim Tew Hong* [1957] MLJ 137 at p 138). In the instant case, the first plaintiff has failed to discharge the onus thrown upon her and learned counsel for the defendants was justified in submitting to invoke s 114(g) of the Evidence Act 1950 G as the burden was on the plaintiffs to prove the particular fact against the first defendant (see (i) *Selvaduray v Chinniah* [1939] MLJ 253 at p 253, (ii) *Ramoo v Gan Soo Swee & Anor* [1971] 1 MLJ 235, (iii) *MUI Bank Bhd. Johor v Tee Puat Kuay*, (iv) *Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors* [1998] 3 MLJ 457 at page 572 dan (v) *Chan Yoke Lain (Administrator of the Estate of Chong Yoke Fah, deceased) v Pacific & Oriental Insurance Co Sdn Bhd* [1999] 1 MLJ 303 at p 308).

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[21] Be that as it may, even assuming that if it is found by way of inference that the plaintiffs have on the balance of probabilities established their case against the first defendant without the evidence of the driver of the said motor van in order for the first defendant to answer their case, it is the respectful view of this court that the I first defendant had sufficiently rebutted the plaintiffs' claim against him. On this score, the plaintiffs' claim ought to have been dismissed. In any event, it cannot be denied that it is not for the first defendant to built the case for the plaintiffs who themselves have not produced evidence or sufficient evidence to support or establish their case against the first defendant as alleged.

[22] In civil cases, the incidence of the burden of proof is generally determined by the pleadings which will reflect the issues to be determined. The plaintiff has the legal burden to prove its case on a balance of probabilities. In the instant appeal, the first defendant has given notice by the statement of defence that all the allegations framed against him in the statement of claim are denied. It is therefore incumbent for the plaintiffs to prove the existence of those facts as alleged in the statement of claim under particulars of negligence as pleaded which the plaintiffs have failed to do (see *Karumalay a/l Vanniyan & Anor v Ananthan a/l Rethinam* [2005] 3 MLJ 600 at p 33).

[23] On the question of onus, it is important to consider 'the fact that one does not believe evidence given for the defendant cannot make evidence for the plaintiff in any case' (see per Greer LJ in *Hirschhorn v Evans* [1938] 3 All ER 491). 'Onus is always on a person who asserts a proposition or fact which is not self evident … But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter' (see *Robins v National Trust Co* [1927] AC 515 per Lord Dunedin at p 520).

[24] In *Fardon v Harcourt-Rivington* [1932] All ER 81, at p 83, Lord Dunedin said:

> The root of this liability is negligence and what is negligence depends on the facts with which you have to deal. If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence, but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions". (Rujuk kes *KR Taxi Service Ltd & Anor lwn. Zaharah & Ors* [1969] 1 MLJ 49).

Lord Macmillan said:

> Members of the public motor owners, and pedestrians alike, in their use of the highway, owe to each other a duty to take care that they do not injure each other. The mere circumstance of being on a highway brings them into a relationship with each other from which relationship arises the duty to have regard for each other's safety. In each case the question is whether there is any evidence of such carelessness in fact as amounts to negligence in law — that is to breach of the duty to take care. To fulfil the duty the user of the road is not bound to guard against every conceivable eventuality, but only against such eventualities as a reasonable man ought to foresee as being within the ordinary range of human experience.

[25] In *Jafri bin Elias v Khor Tan Seah* [1992] 2 CLJ 1016, his Lordship KC Vohrah J (as he then was) at p 1019 said:

> In my view it was unjustified for the judge to put liability at all on the defendant when the plaintiff had not discharged the onus of proof on him on balance of probabilities that the accident was caused by negligence of the defendant either wholly or partially and I therefore allowed the appeal of the defendant with costs (see *Eastern Enterprise Ltd v Ong Choo Kim* [1969] 1 MLJ 236 at p 244).

A **[26]** The appeal by the defendants against the finding of 100% liability against the first defendant is, therefore, allowed. The finding by the learned sessions court that the first defendant is 100% liable is set aside. The plaintiffs' claim against the defendants is dismissed with costs.

B **[27]** By consent, the appeal by the defendants against the award of RM6,000 by the learned sessions court judge towards pain and suffering of the deceased until his death is allowed and set aside. As the defendants have withdrawn the appeal against the other awards, the appeal is dismissed.

CROSS APPEAL BY PLAINTIFFS

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[28] As to the cross-appeal by the plaintiffs on the award for loss of dependency, this court is of the view that based on the materials before the trial court, the award of RM500 per month by the learned sessions court judge is reasonable and there is no reason to interfere. The cross appeal by the plaintiffs against the award for loss of **D** dependency is dismissed.

[29] As agreed, each party to bear its own costs of the appeal. Deposit of the appeal is ordered to be refunded to the plaintiffs' solicitors.

E *Appeal allowed.*

Reported by Loo Lai Mee

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